U.S. Department of Justice

United States Attorney
Eastern District of New York

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271 Cadman Plaza East
Brooklyn, New York 11201

January 25, 2009

BY ECF and Hand Delivery

The Honorable Jack B. Weinstein
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Charles Carneglia
Criminal Docket No. 08 CR 76 (S-13)(JBW)

Dear Judge Weinstein:

The government respectfully writes to request that the Court not exclude mention of the word acid from the trial of the above-captioned case.[1] As the Court is aware, numerous cooperating witnesses know of and can testify concerning the defendant's use of acid both to dispose of bodies for the Gambino family, and to torture two Gambino family associates who were the victims of a kidnaping charged in Racketeering Act 12. In proving each instance of this Gambino family activity, the government expects that the testimony of numerous cooperating witnesses will overlap concerning numerous granular details that will demonstrate both the truth of their accounts and their intimate knowledge of the defendant — key concerns in a case that the government intends to prove largely on the basis of these cooperating witnesses' testimony. The probative value of such evidence is by no means substantially outweighed by any unfair prejudice to the defendant in this case, where the government will prove he personally committed five brutal murders. Indeed, the Second Circuit has found that Rule 403 must not be used to shield defendants from their conduct, or from the force that a truthful, accurate and detailed account of that conduct will add to the government's proof. Thus, as detailed more fully below, under Rule 403 of the Federal Rules of Evidence, the testimony at issue is properly admitted.

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[1] At the January 15, 2009 and January 20, 2009 status conferences on this matter, the Court indicated that it would consider further briefing on this issue.

Facts

A. The Defendant's Use of Acid to Dispose of Bodies

1. CW1

CW1 was 12 years old when John Gotti, the future boss of the Gambino organized crime family of La Cosa Nostra (the "Gambino family'), ordered the murder of John Favara. Gotti ordered his murder because Favara had accidentally run over Gotti's 12-year-old son when the boy darted out into traffic on a minibike he borrowed from CW1. At that time, CW1 was at the beginning of his long and extraordinarily close relationship with the defendant and his brother, the currently incarcerated Gambino family captain John Carneglia. John Carneglia had informally "adopted" CW1 shortly before, and from that point forward, treated CW1 as a member of the Carneglia family - living with the Carneglias for long stretches, being supported by John Carneglia, attending family dinners and events and going on Carneglia family vacations.

Approximately five years after Favara's murder, CW1 was helping the defendant prepare for demolition an abandoned house owned by the defendant and his brother. The house was to be torn down and the space used to expand the Carneglia brothers' junkyard on Fountain Avenue in Brooklyn. While cleaning out the basement, CW1 tipped over a barrel filled with acid. At the time, the defendant warned CW1 to be careful, telling him that the acid would eat right through him if he touched it.

Years later, the defendant repeatedly told CW1 about what that acid had been used for. By this point, the defendant's brother had received a 50-year jail sentence and the defendant and CW1 had become extraordinarily close, seeing each other on a daily basis and participating in innumerable Gambino family crimes together, including murders, in addition to continuing to attend Carneglia family events. CW1 reports that conversations concerning the acid typically arose in the following two contexts.

First, the defendant, a lifelong heavy drinker and drug user, would cite to CW1 his disposal of Favara's body as an example of his ability to competently function in the face of Gambino family criticism of his drinking and drug use. The defendant explained that Gambino family soldier Angelo Ruggiero had ordered the defendant to dispose of Favara's body following his murder. The defendant said that he did so by placing Favara's body in a barrel of acid. At first, the defendant said that he did not choose an appropriate type of acid, which meant that the disposal of Favara's body took much longer than he expected. Ruggiero thus became angry and claimed that the defendant's heavy drug and alcohol use was interfering with his ability to capably perform his duties as a Gambino family associate. In response, the defendant changed the acid and successfully disposed of Favara's body. When the job was done, the defendant bragged to CW1 on numerous occasions, he announced that fact to Ruggiero by approaching him in the Lindenwood Diner and tossing one of Favara's finger bones into a bowl of chicken soup Ruggiero was eating. The defendant told CW1 this story on numerous occasions after he had received criticism from fellow Gambino family members for his drinking and drug use as a way to defend himself – to demonstrate his value to the family, his competence, and to show his bravado in answering to those like Ruggiero who questioned his ability to function.

The second context in which the defendant discussed his use of acid to dispose of bodies concerned Gambino family associate Andrew Curro. Curro, a close associate of the defendant's, received a 25-year sentence for murder in 1986. The defendant told CW1 that Curro earned this bad luck because, unlike the defendant, he would wear jewelry that he and the defendant took off bodies they disposed of in the basement CW1 helped clean. The defendant explained that he would remove jewelry from the corpses prior to dissolving them, hanging the jewelry on hooks in the basement rather than wearing it since "it didn't bring them [the victims] no luck." During these conversations, the defendant referred to the basement as his "body shop," and bragged to CW1 about the stories that would be told if "those walls could talk."

2. CW2

While not a de facto member of the defendant's family, Gambino family associate CW2 developed a close relationship with the defendant, the Gambino family member to whom he reported throughout much of the 1990s. During this period, CW2 committed myriad Gambino family crimes with the defendant and saw him on a near-daily basis. Their interactions included numerous visits by CW2 to the defendant's home, where CW2 often found the defendant in a drunken and/or drug-addled state. At such times, the defendant would rant to CW2 about various crimes he committed, including his disposal of bodies for the Gambino family. On at least one occasion, in discussing his expertise in this area, the defendant showed CW2 a book he possessed on dismemberment, but explained to CW2 that, in his experience, acid was the best way to get rid of a corpse.

3. CW3

CW3 is another close associate of the defendant. CW3 met the defendant in the late 1960s and was a close criminal associate of his from the 1970s through the mid-1990s, which includes a period of several years in which CW3 reported directly to John Carneglia and, after his incarceration, directly to the defendant. In the 1970s, CW3 committed numerous crimes with the defendant, including stealing cars and delivering them to the Fountain Avenue junkyard the defendant and his brother operated, distributing marijuana and assaulting Gambino associate Carmine Agnello. CW3 committed all of these crimes with, among others, his friend Andrew Curro, a close associate of the defendant's until Curro's incarceration in approximately 1982. Curro was also with CW3 and the defendant at the Esquire Diner on February 10, 1975, the night Albert Gelb arrested the defendant.

CW3 recalls one day in the mid to late 1970s when he was together with Curro and the defendant. The defendant said he had a corpse wrapped up in a blue paint tarp under the floorboards in the barn the defendant and his brother owned on Pine Street, an industrial area approximately two blocks from the junkyard on Fountain Avenue. The defendant said that the corpse was that of a heroin junkie who had been killed by someone he knew and that the defendant was getting rid of the corpse as a favor to that person. The defendant explained how he was going to fold up the corpse in half, put it into a plastic pickle barrel he had obtained from a nearby store, put the top on and pour acid through a hole on top. The defendant later explained that after several days passed, he put an implement inside the barrel and stirred it around to make sure the corpse was dissolved, picked up the barrel with a backhoe, brought it out onto the street and poured its contents into the sewer. The defendant exclaimed that the whole neighborhood stunk after that.

B. Kidnaping of John Doe #6

The government anticipates calling as many as six witnesses to prove Racketeering Act 12, the kidnaping of a Gambino family associate identified in the indictment as John Doe #6. Each witness's testimony is expected to encompass the same basic facts: (1) that the defendant became enraged when a violent incident took place during a party at his brother's house in the mid-1990s; (2) that the defendant had John Doe #6 and at least one other individual kidnaped in order to question them and determine who was responsible for the incident; (3) that the victims were brought to a junkyard, where the defendant proceeded to question them about the incident at his brother's home; (4)

that the defendant dripped acid on their feet using a turkey baster when the victims failed to disclose the information demanded; and (5) that John Doe #6's foot was badly burnt by the acid, causing him to appear with a bandage on it immediately thereafter and to later develop scar tissue.

To corroborate this witness testimony, in 2008, the government obtained photographs of John Doe #6's right foot which, more than a decade later, still shows scarring from the defendant's assault.

C. Court's Order

On January 20, 2009, the Court issued the following order:

> The word "acid" or any reference to the use of acid shall not be allowed at trial. See Fed. R. Evid. 403. Where acid was allegedly used in the disposition of a body, the witness may indicate that the defendant helped dispose of that body. Where acid was allegedly used or threatened to be used for torture, the witness may indicate that the defendant used or threatened to use painful methods against alleged victims.

Law

Federal Rule of Evidence 403 provides that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. (Emphasis added). "Probative evidence is not inadmissible solely because it has a tendency to upset or disturb the trier of fact." United States v. Salameh, 152 F.3d 88, 122-23 (2d Cir. 1998); see also Rivers v. United States, 270 F.2d 435, 439 (9th Cir. 1959) ("The persistent assertion in criminal cases that the jury should not be permitted the benefit of relevant evidence because it is thought to be 'gruesome' constitutes, in effect, an attack upon the entire jury system. If a jury is incapable of performing its function without being improperly influenced by evidence having probative force, then the jury system is a failure. It is not a failure. Long experience convinces us of the ability and willingness of citizens called for jury duty to perform that duty with fidelity."). Further, in United States v. Pepin, 514 F.3d 193, 208 (2d Cir. 2008) the Second Circuit found that "it would be odd, indeed, if the very gruesomeness of the killings of which [the defendant] was charged were to disjoint and abbreviate the prosecution's presentation of the case against him."[2]

Discussion

The same holds true here. The Court has ruled that the substantive evidence at issue is relevant to the crimes charged. The question is thus whether the probative value of an accurate and detailed account of such evidence is substantially outweighed by the danger of unfair prejudice. For the reasons below, it is not.

A. Testimony Concerning the Use of Acid to Dispose of Bodies Should Be Permitted

This case will be decided on the jury's determination concerning the truthfulness of the government's cooperating witnesses. Those witnesses are convicted felons who are former members and associates of organized crime, many of whom have pled guilty to more than one murder. Defense counsel will and must use all means at their disposal to discredit and attack the government's cooperating witnesses to effectively represent their client. Such attacks will necessarily include assaults on the cooperating witnesses characters, their motives to fabricate stories about the defendant, and their memories. The "acid" testimony here at issue is a remarkably powerful answer to these attacks.

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[2] The Supreme Court too has provided a compelling rationale for permitting parties to present all the evidence they possess:

> Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.

Old Chief, 519 U.S. 172, 188 (1997) (internal quotation, alteration, citation and footnote omitted).

To begin, with respect to the use of acid to dispose of bodies, the interlocking testimony of the three cooperating witnesses – who, it should be noted, are the three witnesses closest to the defendant and will provide the most damning evidence of his guilt – strengthens the government's case in significant ways. First, the testimony demonstrates the remarkable closeness each witness shared with the defendant. It is a sign of remarkable trust to confess to disposing of a murder victim. That the defendant chose to do so with these three witnesses speaks volumes about their relationships with him – a fact which is paramount in establishing the veracity of their testimony on this relevant fact, but also concerning their other testimony, including the defendant's admission to a number of the charged murders.

Second, the three cooperating witnesses' testimony on this score will serve to fend off attacks on their credibility through the corroboration each witness provides the other. Just as the defense will pounce upon any inconsistencies in the cooperating witnesses' accounts of past criminal activity with the defendant, the government should be able to rebuff such attacks and restore its witnesses' credibility by pointing to the sorts of details each knows that could not be fabricated. Those facts – that the bodies were disposed of in an abandoned buildings adjacent to the defendant's junkyard, that he used acid – a highly unusual method – to dispose of the bodies, and that he readily extolled the virtues of this method – provide the sort of corroboration that substantially adds to each witnesses' credibility not only concerning this aspect of the defendant's participation in the Gambino family, but as to the witnesses' entire testimony.

The significant probative force of such testimony is not in doubt. The question thus becomes whether that value is substantially outweighed by the danger of unfair prejudice. As an initial matter, it is far from self-evident that that the testimony at issue is more inflammatory than the five charged murders. Many jurors may find testimony that the defendant, for example, ran up behind Louis DiBono and fired four bullets into his brain, more disturbing than the fact that he used acid to dispose of murder victims killed by others. Further, as Judge

Korman pointed out in United States v. Mejia-Velez, 855 F. Supp. 607, 611 (E.D.N.Y. 1994), evidence of uncharged acts could be no more prejudicial than those charged if all the evidence were adduced from the same cooperating witnesses. Id. ("If the jury found these witnesses to be credible, the defendant would be convicted even if they were not permitted to testify about [the uncharged crimes].")

Moreover, as the Court has ruled the evidence is properly admitted since it goes to the defendant's role in the Gambino family, there is nothing unfair about any prejudice that accrues to him based on the way he chose to carry out that role. As the Second Circuit properly found in Pepin, it is "odd indeed" that the defendant should be the beneficiary of his choice to dispose of bodies in the manner that he did. 514 F.3d at 208. Yet that is precisely the result that excluding the word acid will here render.

For example, one must assume that had the defendant simply decided to fill the barrels with cement and dump them in the ocean – a method of body disposal the Court noted was more typical, see Transcript of January 15, 2009 status conference at 38 – the government could doubtless ask its three cooperating witnesses to discuss the type of boat the defendant used, where he anchored it, the color of the deck, the means used to lift and dump the barrels and myriad other details, significantly buttressing the veracity of their accounts. But because the defendant discovered what he deemed to be a better way to go about his business, the government is denied its full opportunity to prove his crime with its most compelling, accurate and detailed evidence.[3]

The extraordinary detail provided in the cooperating witnesses's accounts, especially those of CW1 and CW3, in and of itself lends credibility to their testimony. In its instructions on evaluating witness credibility, the Court will undoubtedly tell the jurors to evaluate all aspects of a witnesses' testimony. What is the juror to do with the gaping hole surrounding each instance in the trial where a truthful account of the defendant's conduct would necessarily include a detailed story involving use of the word acid? As the Supreme Court correctly pointed out in Old Chief, such gaps pose a significant danger for prosecutors:

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[3] Were the Court not to reconsider, it should also be noted that the message sent is clear: Those planning to dispose of bodies should do so in the most grotesque way imaginable to ensure their conduct cannot be proved in Court.

> [B]eyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. . . . A prosecutor who fails to produce [an essential piece of evidence], or some good reason for his failure, has something to be concerned about. If jurors' expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party.

519 U.S. at 188 (internal quotation, alteration, citation and footnote omitted; emphasis supplied).

For these reasons, in Rivers, Salameh, Pepin, and the other cases cited above, the courts properly recognized that white-washing the defendant's conduct as here proposed is, at base, a finding that the jury system is a failure – that the "jury is incapable of performing its function without being improperly influenced by evidence having probative force." Rivers, 270 F.2d at 439. The government urges to the Court to side with this circuit and others, and reject this approach. The probative force of the evidence at issue is by no means substantially outweighed by any unfair prejudice. This is a result that can be further ensured by the Court's ability to provide the jury with any necessary guidance in the form of a limiting instruction.

B. Testimony Concerning the Use of Acid in During the Kidnaping of John Doe #6 Should Be Permitted

The government's six cooperating witnesses who can testify concerning the defendant's use of acid during the kidnaping of John Doe #6 should be permitted to do so for the reasons detailed above. In addition, with respect to this crime, it is extraordinarily difficult to argue that pouring acid on the feet of two Gambino family associates is in any way more shocking than the testimony the jury will hear concerning the five charged murders. As such, since the evidence is clearly relevant to the crime and to the cooperating witnesses' credibility in relating their accounts of it, a straightforward application of Rule 403 provides no reason for its exclusion.

Furthermore, and perhaps most compellingly, excluding testimony concerning the defendant's use of acid in torturing John Doe #6 will render useless the government's photo of the scar tissue remaining on John Doe #6's foot – extraordinarily powerful corroboration of the interlocking testimony the government's six cooperating witnesses are expected to provide.

Because the defendant's use of acid with respect to this charged crime is in no way more inflammatory than other testimony adduced at trial, and omission of such testimony will deprive the government of the use of its corroborative photo – hard proof that the attack took place as described – the Court should permit the government's cooperating witnesses to testify in a full, accurate, detailed and truthful manner as to this crime.

Conclusion

For the reasons set forth above, the government respectfully requests that the Court not preclude the use of the word acid at trial.

Respectfully submitted,

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